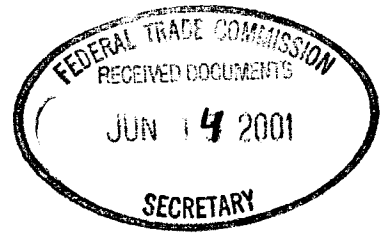


UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION



In the Matter of

SCHERING-PLOUGH CORPORATION,  
a corporation,

UPSHER-SMITH LABORATORIES,  
a corporation,

and

AMERICAN HOME PRODUCTS  
CORPORATION,  
a corporation.

Docket No. 9297

**COMPLAINT COUNSEL'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO  
AMEND THE PROTECTIVE ORDER GOVERNING DISCOVERY MATERIAL  
(PUBLIC RECORD)**

Complaint counsel moved to amend The Protective Order Governing Discovery Material to have Mark Robbins removed as a designated individual, on behalf of Upsher-Smith, to be provided with access to Confidential Discovery Material. Respondent Upsher-Smith opposed, arguing that Mr. Robbins' current position with Upsher-Smith, after he rejoined the company in 1998, does not involve competitive decision making. Complaint counsel submits this Reply Brief In Support Of Its Motion To Amend The Protective Order Governing Discovery Material, to clarify Mr. Robbins' present role as Upsher-Smith's Vice President of Scientific Affairs. The facts show that Mr. Robbins is predominantly involved in competitive decision making concerning clinical research and product development, as opposed to legal review and other functions normally performed by in-house counsel. Consequently the removal of Mark Robbins from The Protective Order is justified.

**Additional Factual Background**

**1. Mr. Robbins Is Involved in Competitive Decision Making.**

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.....)<sup>2</sup> (.....  
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.....)<sup>3</sup> (.....  
.....)<sup>4</sup>  
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.....)<sup>5</sup> Basically, he made technical decisions

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<sup>1</sup> (.....) Pursuant to The Protective Order Governing Discovery Material, entered in this matter on May 10, 2001, Exhibits A-G to this Reply Brief are subject to confidential treatment.

<sup>2</sup> (.....  
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<sup>3</sup> (.....)

<sup>4</sup> (.....)

<sup>5</sup> (.....  
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concerning clinical development and research.

**2. Upsher-smith Does Not Consider Mr. Robbins Their In-house Legal Counsel.**

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<sup>8</sup> (.....)

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.....)<sup>12</sup> (.....  
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.....)<sup>13</sup>

### Argument

Upsher-Smith never held out Mr. Robbins as their in-house legal counsel until now. Upsher-Smith cannot, during the investigation, deny his having legal responsibilities and later claim him as their in-house legal counsel when it suits their purpose.

Mr. Robbins actively participates in Upsher-Smith's "decisions made in light of similar or corresponding information about a competitor," Order On Motions To Amend The Protective Order, June 8, 2001, at 2, including, meeting and negotiating with other firms on new product opportunities in a competitive decision making authority, not as legal counsel. In addition, Mr. Robbins' own monthly reports delineate his role in the clinical development of pharmaceutical products.

His own admission in transcripts, as well as those of Mr. Kravolec, and the internal documents of Upsher-Smith establish that Mr. Robbins' duties as Vice President of Scientific

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<sup>12</sup> (.....)

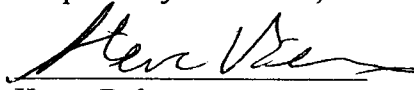
<sup>13</sup> (.....)

Affairs mirror those of Dr. Elio Mariani, his counterpart at non-party KV Pharmaceutical Company. Mariani Dec. ¶ 5. Like Dr. Mariani, Mr. Robbins actively participates in and oversees the clinical testing of products, as well as the pursuit of new product opportunities.

### Conclusion

Contrary to Upsher-Smith's assertions, Mr. Robbins primarily acts in a business capacity, not as a lawyer. The organizational structure of Upsher-Smith and the documentation of Mr. Robbins' role and the role of employees under his supervision demonstrate that. In order to protect the trade secrets and commercial information of third parties, and protect the FTC's future enforcement and investigatory efforts, we respectfully move that Mr. Robbins be removed from Paragraph 5 of the Terms and Conditions of The Protective Order Governing Discovery Material as a designated individual.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Karen Bokar", written over a horizontal line.

Karen Bokar  
Steve Vieux

Counsel Supporting the Complaint

Bureau of Competition  
Federal Trade Commission  
Washington, D.C. 20580

Dated: June 14, 2001

## CERTIFICATE OF SERVICE

I, Steve Vieux, hereby certify that on June 14, 2001, I caused a copy of the public version of Complaint Counsel's Reply Brief In Support Of Its Motion To Amend The Protective Order Governing Discovery Material to be served upon the following persons by Federal Express and facsimile:


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and that two paper copies were served by hand upon:

The Honorable D. Michael Chappell  
Administrative Law Judge  
Federal Trade Commission  
Room 104  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

  
Steve Vieux